A **Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–63 OF 1998
B MOHD HISHAMUDIN J
18 AUGUST 2004

Civil Procedure — Costs — Review of costs — Whether the court was functus officio — Whether the court has inherent powers to review the order on cost — Whether the third
C *defendant who was not directly involved in the publication of the plaintiff's photograph ought to be penalized at all with costs — Rules of the High Court 1980, Order 59 rule 3(2)*

D *Tort — Defamation — Libel — Female Magazine published photograph of plaintiff without her consent — Carried a write-up 'A Special Night…Nothing could be more special than the night of your wedding — Whether the combined effect of the photograph and the write-up was defamatory of the plaintiff — Whether it portrayed her as a woman of loose moral and an unsuccessful doctor who had to resort to part-time modeling to*
E *supplement income*

The plaintiff's claim against the defendants is for the tort of defamation arising from a write-up in a bridal gown promotion page in the September 1995 issue of the
F Female Magazine. At the material time, the plaintiff was a Government medical officer attached to the General Hospital, Kuala Lumpur. The plaintiff alleged that the photograph was published without her consent and that the write-up 'A Special Night… Nothing could be more special than the night of your wedding' when read together with her photograph on the same page portrayed her as a woman of loose moral and an unsuccessful doctor who had to resort to part-time modeling to
G supplement her income. The photograph and the write-up in the magazine were published by the first defendant with the knowledge and approval of the second defendant but without the knowledge or approval of the third defendant. The issue before this court was whether the combined effect of the photograph and the write-up was defamatory of the plaintiff.

H

Held, tort of defamation failed with the award of costs for the plaintiff:

(1) The meaning of the above words must be ascertained by considering the
I context in which they are written. In terms of both, semantics and literary, there is nothing in the write-up that states or implies that the plaintiff in the bridal gown is a person who 'encouraged and/or condoned immoral activities and was lacking in virtues'. It also does not present or imply anywhere within the text that the 'plaintiff is not a successful medical practitioner and had engaged in modeling to supplement her income' (see para 15, 19 & 20).

(2) With regards to the photograph, a single appearance does not make a person into a model. It is true that the plaintiff is the model in the layout but this does not make her a model. It is rather far-fetched for anyone to say that the photograph implies that the plaintiff needed to have the shot taken 'to supplement her income' (see para 22).

(3) With regards to the Female Magazine as a whole, there is nothing vulgar or sleazy about the magazine. It is a respectable magazine that caters to the needs and interests of women in general (see para 25).

(4) It was unethical and morally wrong for the first and second defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. Therefore, the first and second defendants are ordered to pay costs to the plaintiff in the following proportion: 80% to be borne by the first defendant and 20% by the second defendant. As for the third defendant, considering that he was not directly responsible for the publication, the general principle as to costs (that costs follow the event) should apply in respect of the third defendant, and there is no strong or compelling reason to depart from that general principle (see para 41 & 51).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah di bawah tort memfitnah yang wujud daripada tulisan di dalam muka surat promosi baju pengantin, Majalah *Female*, isu bulan September 1995. Pada ketika itu, plaintif merupakan pegawai perubatan Kerajaan dan berkhidmat di Hospital Besar, Kuala Lumpur. Plaintif menyatakan bahawa gambarnya dicetak tanpa kebenarannya dan tulisan 'Suatu Malam Istimewa…Tiada yang lebih istimewa daripada malam perkahwinan kamu' bila di baca dengan gambarnya di muka surat yang sama, menggambarkannya sebagai perempuan tidak moral (loose moral) dan seorang doktor yang tidak berjaya dan terpaksa bekerja sambilan selaku modal untuk menampung pendapatannya. Gambar dan tulisan tersebut dicetak di dalam majalah tersebut oleh defendan pertama dengan pengetahuan dan persetujuan defendan kedua tetapi tanpa pengetahuan atau persetujuan defendan ketiga. Isu di mahkamah ini adalah sama ada gambar dan tulisan tersebut adalah fitnah terhadap plaintif.

Diputuskan, tort memfitnah ditolak dengan kos bagi plaintif:

(1) Maksud perkataan tersebut hendaklah di tentukan dengan merujuk kepada konteks di mana ianya ditulis. Secara harfiah dan semantik, tidak ada langsung di dalam tulisan itu yang menyatakan atau secara implikasi bahawa plaintif di dalam baju pengantin adalah seorang yang 'menggalakkan dan/atau membenarkan aktiviti yang tidak senonoh dan tidak bermaruah'. Ianya juga tidak diketengahkan atau secara implikasi dari mana-mana bahagian teks bahawa 'plaintif bukanlah seorang pengamal perubatan yang berjaya dan terpaksa berkecimpung di dalam 'modeling' bagi pendapatan sambilannya (lihat perenggan 15, 19 & 20).

(2) Berkaitan dengan gambar, percetakan sekali tidaklah menjadikan seseorang itu sebagai modal. Benar, plaintif telah dijadikan modal di dalam layout tetapi ini tidak menjadikannya sebagai seorang modal. Dan pada pendapat saya, ianya adalah keterlaluan bagi seseorang untuk menyatakan bahawa plaintif menginginkan penggambaran itu untuk 'pendapatan sambilannya' (lihat perenggan 22).

(3) Berkaitan dengan Majalah *Female*, pada keseluruhannya tidak ada langsung perkara yang kurang sopan atau senonoh berkenaan majalah itu. Ianya adalah majalah yang dihormati dan pengeluarannya adalah untuk kemudahan dan keperluan wanita pada umumnya (lihat perenggan 25).

(4) Ianya adalah tidak beretika dan secara moralnya salah bagi defendan pertama dan kedua untuk mencetak gambar plaintif bagi maksud promosi komersial tanpa persetujuannya. Oleh yang demikian, defendan pertama dan kedua dengan ini diperintahkan membayar kos kepada plaintif seperti berikut: 80% hendaklah dibayar oleh defendan pertama dan 20% oleh defendan kedua. Bagi defendan ketiga, memandangkan dia tidak bertanggungjawab secara langsung dalam publikasi, prinsip umum berkenaan kos (kos ditentukan oleh keadaan) hendaklah dipakai terhadap defendan ketiga dan tidak ada alasan kukuh atau menghendaki untuk berpisah daripada prinsip umum ini (lihat perenggan 41 & 51).]

Notes

For cases on libel, see 12*Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.
For cases on review of costs, see 2(1) Mallal's Digest(4th Ed, 2004 Reissue) para 1845.

Cases referred to

Ottoway v Jones [1955] 2 AII ER 585 (refd)
Petroliam Nasional Bhd (PETRONAS) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 3(2)

Dato VK Lingam (Pradeep Kumar with him) (KL Rekhraj) for the plaintiff.
Mah Weng Kwai (Sabiha Jalaludin with him) (Mah Weng Kwai & Associates) for the first defendant.
Cheah Tien Eu (Suhaimi Khor Zulkifli & Chang) for the second and third defendants.

Mohd Hishamudin J:

[1] I shall now issue my full judgment of this case. A brief judgment was delivered in open court on 18 August 2004.

[2] This action is a claim by the plaintiff against the defendants for the tort of defamation arising from a write-up in a bridal gown promotion page in the September 1995 issue of the Female magazine.

[3] At the material time the plaintiff was a Government medical officer attached to the General Hospital, Kuala Lumpur. **A**

[4] The first defendant was the publisher of the Female magazine. The second defendant ran a bridal gown shop/boutique called White & Lacy whilst the third defendant ran a photo studio by the name of TAG Studio. **B**

[5] In the September 1995 issue of Female magazine at p 159, there is a bridal gown promotion-cum-advertisement co-sponsored by three parties, namely **C**

(a) Female magazine, that is to say, the first defendant;

(b) White & Lacy, that is to say, the second defendant; and

(c) TAG Studio, that is to say, the third defendant.

[6] The promotion-cum-advertisement page has a write-up with the heading: **D**

A Special Night…

[7] And, immediately below this heading, are the following words:

Nothing could be more special than the night of your wedding. From the trousseau to your walk down the aisle, all eyes are turned to you, you'll want everything to be just right **E**

[8] Then, what follows next is a write-up which directly concerned the promotion-cum-advertisement which is not directly the subject matter of this suit. **F**

[9] On the right hand side of the page is a photograph of the plaintiff attired in a bridal gown.

[10] The complaint of the plaintiff is that the photograph was published without her consent, and that the words: **G**

A Special Night…

Nothing could be more special than the night of your wedding.

when read together with her photograph on the page, portray her as a woman of loose moral and as an unsuccessful doctor who had to resort to part-time modeling to supplement her income. **H**

[11] It is undisputed that the photograph was published without the consent of the plaintiff. **I**

[12] From the evidence it is my finding that the write-up and the photograph were published in the Female magazine by the first defendant with the knowledge and approval of the second defendant but without the knowledge or approval of the third defendant.

[13] In the present case, I think it suffices that I deal with only one issue: Was the combined effect of the write-up and the photograph defamatory of the plaintiff?

[14] Having given due consideration to the evidence and submissions, in my judgment, the words complained of appearing at p 159 of the September 1995 issue of the Female magazine:

A SPECIAL NIGHT…

Nothing could be more special than the night of your wedding.

read together with the plaintiff's photograph do not convey any derogatory meaning.

[15] The meaning of the above words must be ascertained by considering the context in which they are written.

[16] The words appear in the context of a bridal-gown promotion. It refers to a special package that is co-sponsored by a bridal boutique (White & Lacy, ran by the second defendant), a photography studio (TAG Studio owned by the third defendant) and a magazine (Female magazine: published by the first defendant). To my mind, the words are appropriate and have nothing to do with any immoral activity or lack or virtues.

[17] The plaintiff, in her complaint, clearly has highlighted only a partial aspect of the write-up, that is to say,

A Special Night… Nothing could be more special than the night of your wedding,

when in fact, it continues to explain itself succinctly in the words that follow, that is to say:

From the trousseau to your walk down the aisle, all eyes are turned to you, you "II want everything to be just right.

[18] That the write-up centers on a bride walking down the aisle to the marvel of others and euphoric emotions of the bride. There is no connotation of copulation, as alleged. In my view, the plaintiff has contorted a simple and clear-cut concept.

[19] In addition, in terms of both, semantics and literary, there is nothing in the write-up that states or implies that the plaintiff in the bridal gown is a person who (to quote para 10(a) of the statement of claim) 'encouraged and/or condoned immoral activities and was lacking in virtues'.

[20] It also does not present or imply anywhere within the text that the (to quote para 10 (c) of the statement of claim) 'plaintiff is not a successful medical practitioner and engaged in a modeling to supplement her income'

[21] In my judgment, the main idea of the author of the write-up, in particular, the words:

A Special Night Nothing can be more special than the night of your wedding,

has been grossly distorted and exaggerated by the plaintiff and her witnesses.

[22] With regards to the photograph, a single appearance does not constitute one to be regarded as a model. True, that the plaintiff is modeled in the layout, but this does not make her a model. And to my mind it is rather far-fetched for anyone to say that the photograph implies that the plaintiff needed to have the shot taken 'to supplement her income' A

[23] Modeling is a profession. With reference to the evidence of PW3, Dato' Dr Pius Martin, the father of the plaintiff, I must rule out that it is clearly a biased and discriminative statement to say that the public has a low perception of the modeling profession. B

[24] The photograph itself of the plaintiff as a bride in her wedding gown does not portray anywhere near a woman of a low character. In fact, she is decently dressed. She is fully attired with even a veil to cover part of her head. With reference to the plaintiffs allegation, once again, to my mind, the concept of the photograph has been overblown out of proportion. C

[25] Perhaps I must add that as to the Female magazine as a whole, I feel I am impelled to comment that I find nothing vulgar or sleazy about the magazine. On perusing the pages, I find it a respectable magazine that caters to the needs and interests of women in general. I have just said that I feel I am impelled to comment. I say so because notwithstanding the fact that the nature of the magazine as a whole or the nature of the contents of other pages of the magazine is not pleaded in the statement of claim, and thus is not in issue or relevant, yet, in the course of the trial two witnesses of the plaintiff, namely PW2 and PW3 took liberty to refer to some captions or photographs in some other pages of the magazine in question and commented that the captions or photographs were obscene or phonographic; and learned counsel for the plaintiff at para 46 of his written submissions (encl A/WS(1)) appears to suggest that such evidence are relevant for the purpose of determining as to whether or not the specified words at p 159 and the plaintiff's photograph are defamatory of the plaintiff. In the light of the pleadings, such evidence should not have been adduced and such a submission should not have been made. D E F G

[26] In conclusion, the plaintiff's claim against the defendants for the tort of defamation must fail and accordingly was dismissed.

ON THE ISSUE OF COST

[27] I now come to the issue of costs. H

[28] Although I have dismissed the plaintiff's claim, I did not award the first and second defendants costs. Instead, originally, I had made an order to the effect that the first and second defendants do pay costs to the plaintiff in the following proportion: 80% to be borne by the first defendant and 20% by the second defendant. I

[29] Even as regards the third defendant, although I awarded him costs, I did not originally award him full costs: I had ordered that he be entitled to only 50% of his costs.

A **[30]** I am, of course aware that the general rule is that the successful party is entitled to costs unless he is guilty of misconduct, negligence or omission, or unless there is some other good cause for not allowing costs.

[31] However, in the present case, I found the first and second defendants and to
B a lesser extent (indeed, only to a minimal degree) the third defendant, guilty of some wrongdoing or misconduct in relation to the plaintiff and the present suit.

[32] But having made the above order, I then, upon reflection, felt that although I might probably be fair in my decision on the issue of costs in respect of the first and
C second defendants (this is what I originally thought), I could have been unduly harsh on the third defendant when I did not award him 100% costs.

[33] So, before the order was perfected, I decided to propose to the parties to review my decision in respect of costs, but only pertaining to the third defendant.
D

[34] Accordingly, by letter (encl. 60) and through the Registrar, I directed parties to appear before me on 14 September 2004. The courts letter informed the parties of my proposal to review my order pertaining to costs in respect of the third defendant. The solicitors for the first and second defendant responded to the court's
E letter by writing to the court (their letters being encls 61 and 62, respectively) seeking also a review of the court's order pertaining to the issue of costs in respect of the first and second defendants.

[35] The parties appeared before me on 14 September 2004. I informed all parties
F that I would like them to submit on the issue as to whether I ought to exercise my power of review on the issue of costs pertaining to all three defendants. I fixed 1 November 2004 as the date of the hearing for the review proposal/applications.

[36] At the hearing on 1 November 2004, Encik Pradeep Kumar, counsel for the
G plaintiff raised a preliminary objection, the objection being that the court was functus officio and no longer had the power to review its decision of 18 August 2004. I called for written submissions on this preliminary objection and fixed 18 January 2005 as the date of the decision on the preliminary objection.

H **[37]** On 18 January 2005 I ruled on the preliminary objection. I ruled in favour of the defendants. I ruled that since the order of the court of 18 August was yet to be perfected I had the inherent power to review the order of 18 August. That is trite law.

I **[38]** Accordingly, I invited written submissions on the main issue of the proposed review on the issue of costs and fixed 11 May 2005 as the date of decision.

[39] On 11 May 2005, I gave my decision on the proposal/application for review. In exercise of my power of review, I varied my earlier decision but the decision was, nonetheless, still in favour of the defendants.

[40] The new (varied) order is now as follows. In respect of the first and second defendants, I still maintain that they are not entitled to costs. However, I set aside my previous order that they should jointly bear the plaintiff's costs on an 80% and 20% basis. I felt that my original order was too harsh on the first and second defendants.

[41] As for the third defendant, the new (varied) order is that he is entitled to his full costs, instead of the previous entitlement of 50% only. Considering that he was not directly responsible for the publication, I was of the view that the general principle as to costs (that costs follow the event) should apply in respect of the third defendant and there is no strong or compelling reason to depart from that general principle.

[42] I shall now proceed to explain as to why I am of the view that the first and second defendants are not entitled to costs.

[43] I shall begin by touching briefly on the background. In early 1995, both the plaintiff and Dr Ng Kwee Boon (PW2) decided to get married. Preparations for the wedding were made by the plaintiff and PW2. Prior to the marriage, the plaintiff went to White & Lacy in March 1995 to have the wedding and evening gowns tailored. The plaintiff herself informed the second defendant of her choice of design for the said gowns. The second defendant subsequently designed the wedding and evening gowns to the plaintiff's satisfaction.

[44] Subsequently, the second defendant introduced the plaintiff to the third defendant as the photographer to take the wedding photographs of the plaintiff and PW2. The wedding photographs were taken in early April 1995. The negatives and the wedding photographs of the plaintiff and PW2 were returned by the third defendant to PW2. However, the third defendant kept the rejected prints. The third defendant gave two copies of the rejected prints to the second defendant for her portfolio to be shown to her prospective clients.

[45] Three months prior to the publication of the September issue of the Female magazine, the first defendant decided to have a bridal promotion in the September issue of the said magazine. Three officers of the first defendant, namely:

(1) Ms Susan Abraham;

(2) Ms Kalaivani (DW3), the Senior Promotion Executive; and

(3) Ms Karen Yoong, Promotion Executive were involved in the said bridal promotion.

[46] In July 1995, DW3 was introduced by a former Assistant Sales Manager of the first defendant, one Ms Jennifer Moy to the second defendant for sponsorship of the bridal promotion.

[47] It is not disputed that the idea to publish the plaintiff's photograph for the purpose of the promotion in the Female magazine originated from the first defendant. And it all began when DW3 went to the second defendant's office to

obtain a suitable photograph for the purpose of the publication of the bridal promotion. DW3 saw, chose and took the plaintiff's photograph which was then in the possession of the second defendant as the ideal photograph to be published in the promotion page of the magazine. The second defendant on her part undertook to obtain, on behalf of the first defendant the consent of the plaintiff. When the dateline for the publication of the September issue was drawing near, the second defendant, still had not reverted to the first defendant regarding the consent. However, DW3 was told by Ms Karen Young that the second defendant had told her to go ahead with the publication of the plaintiff's photograph and that she would get the plaintiff's consent. Relying on what Ms Karen had told DW3, the first defendant proceeded to publish the promotion and the photograph. However, as it unfortunately turned out, the second defendant never obtained the consent.

[48] Order 59 rule 3(2) of the Rules of the High Court 1980 states:

> If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[49] In *Ottoway v Jones* [1955] 2 All ER 585 Lord Parker ruled (at p 588)

> One starts with this, that as a general principle, costs follow the event and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise and those grounds, it is well settled must be grounds connected with the cause of action.

[50] The above principle was cited with approval by the Supreme Court in *Petroliam Nasional Bhd (PETRONAS) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25

[51] In my judgment, in the present case, on the issue of costs, there are special grounds connected with the cause of action. The cause of action concerned the unauthorized publication of the plaintiff's photograph in a magazine meant for public circulation. To my mind, it was unethical and morally wrong for the first and second defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. It was an unwarranted invasion of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it stands presently, does not make an invasion of privacy an actionable wrongdoing (it is actionable under the law of some other jurisdictions, for example, in the United States).

[52] I note with dismay that while both the first and the second defendants knew of the necessity to obtain the plaintiff's consent before publishing her photograph, yet they had taken the matter on consent very lightly. And at the trial, as between the first and second defendants, each party took the easy course of action by blaming one another for the failure to obtain the consent.

[53] What should have been the appropriate conduct of the first defendant *vis-a-vis* the plaintiff is that the first defendant ought to have approached the plaintiff directly

in order to obtain the consent of the plaintiff. Yet, foolishly, it chose to rely on the second defendant to obtain the consent; and more foolishly, it proceeded to publish the photograph without first having obtained confirmation from the plaintiff herself as to whether or not she had consented to the publication.

[54] As to the second defendant, she was the person who gave the plaintiff's photograph to the first defendant without the plaintiff's consent. She had an interest in doing so as she was a co-sponsor of the bridal promotion. Although entrusted by the first defendant to obtain the plaintiff's consent, she took no serious effort to obtain the same; although fully aware that the publication of the photograph by the first defendant was imminent.

[55] In the present case, I do take note of the fact that while the second defendant had, through her solicitor's letter, apologized to the plaintiff and offered to publish a joint apology of all three defendants in the then forth coming issue of the ***Female,*** the first defendant, through its solicitors, had refused to do so. This proposed joint published apology, however, did not materialize.

[56] As for the third defendant, although a co-sponsor of the promotion at p 159 of the magazine, he was clearly not involved in the publication of the plaintiff's photograph. However, without the prior consent of the plaintiff, he had given two copies of the plaintiff's photographs (which he called 'rejected prints') to the second defendant for the purpose of her album (which she called 'portfolio') to be shown to intending customers of the second defendant. And, as it turned out, it is one of these photographs that was given to the first defendant and subsequently published at p 159 of the *Female*. But to be fair to the third defendant, he had no idea that both the first and second defendants were going to use that photograph for the purpose of the bridal promotion. Like the second defendant, he too, through his solicitors, had apologized to the plaintiff and offered to have the apology published in the ***Female*** (but this also did not materialize). I do not think that he ought to be penalized at all with costs. There are no special circumstances that warrant the court to do so.

Plaintiff's suit dismissed. Costs to the third defendant. No costs awarded to the first and second defendants.

Reported by Ashgar Ali Ali Mohamed